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No. 06-503

IN THE
Supreme Court of the United States

CROWN EQUIPMENT CORPORATION,
Petitioner,

v.

JEREMIAH "BART" MORRIS,
Respondent.

On Petition for a Writ of Certiorari to the West Virginia Supreme Court of Appeals

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BRIEF OF *AMICI CURIAE* AMERICAN TORT REFORM ASSOCIATION, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS, AND THE WEST VIRGINIA CHAMBER OF COMMERCE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

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[1] No counsel for either party has authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel, have made a monetary contribution to the preparation or submission of this brief. All parties consented to the filing of this brief and their letters of consent have been lodged with the Clerk of the Court.

Amici are associations sharing a common interest in a fair, balanced, and predictable civil justice system. Their members include small and large businesses, trade associations, and municipalities, spanning every sector of the nation's economy. A more complete description of each amicus is set forth in Appendix A to this brief.

This case is of interest to *amici* because the decision below, if permitted to stand, not only threatens a regression to courts clogged by nonresident plaintiff claims in West Virginia, but casts a cloud over legitimate actions by state legislatures and judiciaries to address forum shopping. This Court has long held that states may permissibly regulate access to their local courts by nonresidents whose claims have little or no connection to the state. The West Virginia Supreme Court of Appeals' decision that the Privileges and Immunities Clause of the U.S. Constitution does not permit states to distinguish between resident and nonresident plaintiffs with respect to judicial administration is contrary to the well-established precedent of this Court.

Even more significantly, the decision places at risk the ability of courts throughout the nation to consider the state of residence of the parties when applying traditional forum non conveniens principles and places into question many similar state statutes. It could lead to uncertainty and, in some situations, utter reluctance on the part of state courts and legislatures to curb inappropriate forum shopping. As *amici* will show, uncertainty regarding the application of the Privileges and Immunities Clause was a significant factor in impeding the development of forum non-conveniens many years ago. Today, as commerce regularly extends across state lines, it is even more imperative that states have the unquestionable authority to dismiss cases of nonresidents that do not have a substantial relation to the forum state.

STATEMENT OF THE CASE

Amici adopt and incorporate Petitioner's statement of the case.

SUMMARY OF ARGUMENT

The State of West Virginia was and continues to be viewed as a magnet jurisdiction for cases that have no substantial relationship to the State and as a jurisdiction that is particularly unfavorable to civil defendants.[2] To address this problem, the West Virginia statute in question barred nonresidents from bringing suit in West Virginia courts unless all, or a substantial part, of the acts or omissions giving rise to the lawsuit occurred in West Virginia; or they cannot obtain jurisdiction over the defendant in the state where the action arose. *See* W. Va. Code § 56-1-1(c).

Here, the plaintiff was a citizen of the State of Virginia. The workplace accident giving rise to the claim occurred in Virginia. The forklift that the plaintiff alleges is defective was sold, delivered, installed, and serviced in Virginia, and never entered West Virginia. Furthermore, the conduct of the Petitioner, an Ohio corporation, did not occur in, and had absolutely nothing to do with, the State of West Virginia.[3] It

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[2] *See, e.g.*, Defense Trial Counsel of West Virginia, *Civil Justice Committee Report on the State of West Virginia's Civil Justice System* 7 (2003) (finding West Virginia a "magnet court" for claims with no relation to the state); Harris Interactive, *2003 U.S. Chamber of Commerce State Liability Systems Ranking Study* 80 (2003) (ranking West Virginia 49 out of the 50 states in overall litigation fairness and near the bottom for every other indicator of a fair civil justice system).

[3] The fact that co-defendant Jeffords is incorporated in West Virginia is inconsequential. As this Court has recognized, "Under modern conditions corporations often obtain their charters from state where they no more than maintain an agent to comply with local requirements while every other activity is conduct far from the chartering state. Place of corporate domicile in such circumstances might be entitled to little consideration under the doctrine of forum non conveniens, which resists

was brought by the Respondent in a classic forum shopping effort to find a jurisdiction that might look with particular favor upon a plaintiff and apply the state's more advantageous comparative negligence law and perception of more favorable treatment by the state's judicial system.

The Privilege and Immunities Clause of Article IV, Sec. 2, of the Constitution of the United States should not be used as a tool to block legitimate attempts to stem lawsuit abuse – specifically, the flooding of a state's local courts by nonresident claims with little or no connection to the state. The West Virginia Supreme Court of Appeals' decision commits this precise error. *See Morris v. Crown Equip. Corp.*, 633 S.E.2d 292, 300 (W. Va. 2006). Improper construction of the Constitution has harmful consequences from both a local and national public policy perspective.

First, the West Virginia Supreme Court of Appeals' decision stops a legitimate state legislative attempt to prevent its courts from being overwhelmed by claims filed by nonresidents seeking to take advantage of procedural advantages, favorable law, or a perception of pro-plaintiff lower state courts and juries. The citizens of West Virginia will be harmed by this action and find their own attempts to seek justice delayed by claims that should be properly brought in other states. Further, West Virginia taxpayers bear the costs of litigation brought by nonresidents, who are effectively "free riders" on the state's judicial system. Local residents will also bear the burden of jury service on what can be lengthy and complex trials in which the state has no interest.

The ruling of the West Virginia Supreme Court of Appeals also sends a disturbing and unfounded signal to state

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formalization and looks to the realities that make for doing justice." *Koster v. American Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 528 (1947).

legislatures that wish to stop unwarranted forum shopping in their own jurisdictions. They have been informed by this decision that requiring nonresident plaintiffs, whose action did not arise in the forum state, to bring suit in their own state may violate the U.S. Constitution. It is a form of judicial nullification of a reasonable state legislative reform in the most dangerous sense. *See* Victor Schwartz, *Judicial Nullification of Tort Reform: Ignoring History, Logic, and Fundamentals of Constitutional Law*, 31 Seton Hall. L. Rev. 688 (2001). While state laws are most often nullified on the basis of an obscure or vague state constitutional provision to further a state judiciary's policy preferences, the West Virginia Supreme Court of Appeals' reliance on the Constitution of the United States places all similar reasonable legislative forum shopping restrictions in jeopardy.

Perhaps most significantly, this ruling casts a nationwide cloud over the application of longstanding principles of forum non conveniens by state court judges. State courts routinely exercise their discretion to decline jurisdiction over cases more appropriately heard in the courts of other states. They make such decisions based on the location of potential witnesses and relevant evidence, the choice of law applicable to the dispute, the possible undue hardship for the defendant, the most efficient use of judicial resources, and the interests of justice. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947). The state of residence of the plaintiff has always been a prominent factor in this calculus.

In sum, there was a clear, rational basis for the West Virginia legislature to provide a venue limitation to keep nonresident cases that have a connection with the state within its court system and cases that have little or no connection with the state out of its court system. The legislature even protected out-of-state plaintiffs more than was constitutionally necessary in that it allowed cases to be brought in West Vir-

ginia if plaintiffs could not find a forum elsewhere. This Court should hear and decide this case to make clear not only to the West Virginia legislature, but to the legislators and judges of the other 49 states and the District of Columbia, that it is constitutionally permissible and appropriate public policy to protect access to justice for local citizens and the taxpayers of a home state by precluding rampant "litigation tourism" from residents of other states. For these reasons, the Petition for Writ of Certiorari should be granted.

ARGUMENT

I. INTRODUCTION

In the 1990s, West Virginia courts faced an onslaught of litigation, many of which involved asbestos claims brought by out-of-state plaintiffs. West Virginia courts reacted by "adopt[ing] diverse, innovative, and often non-traditional judicial management techniques to reduce the burden of asbestos litigation," including mass consolidation of claims. *State ex rel. Appalachian Power Co. v. MacQueen*, 479 S.E.2d 300, 304 (W. Va. 1996).

Instead of relieving burdened court dockets, expedited procedures and judicial shortcuts encouraged claims. As one West Virginia trial judge handling asbestos claims observed, "we thought [a mass trial] was probably going to put an end to asbestos, or at least knock a big hole in it. What I didn't consider was that that was a form of advertising. . . . [I]t drew more cases." *In re Asbestos Litig.*, Civ. Action No. 00-Misc.-222 (Cir. Ct. Kanawha County, W. Va. Nov. 8, 2000). Mass tort expert Professor Francis McGovern of Duke University Law School has explained, "[j]udges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. . . . If you build a superhighway, there will be a traffic jam." Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 Ariz. L. Rev. 595,

606 (1997). The largest single mass consolidation occurred in the state in 2002 when a trial court joined more than 8,000 plaintiffs suing numerous defendants. *See State ex rel. Mobil Corp. v. Gaughan*, 565 S.E.2d 793, 794 (W. Va. 2002) (Maynard, J., concurring) (citing the vast differences between the number of defendants, type of injury, degree of injury, stage of case development, and lawyer interests).

In a ruling that further exacerbated the situation, the West Virginia Supreme Court of Appeals limited the ability of courts to dismiss cases with little or no connection to the state, finding that the "doctrine of forum non conveniens is a drastic remedy which should be used with caution and restraint." *See Abbott v. Owens-Corning Fiberglas Corp.*, 44 S.E.2d 285, 292 (W. Va. 1994). The ruling has attracted non-residents through its adoption of plaintiff-friendly law, including the broadest claim for medical monitoring in the United States. *See Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424 (W. Va. 1999). *But see Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424 (1997).

Not surprisingly, RAND found that West Virginia had become one of a few states where most of the nation's asbestos litigation flowed during the decade preceding adoption of the law at issue. *See* Stephen J. Carroll *et al., Asbestos Litigation* 62 (RAND Inst. for Civil Justice 2005). West Virginia's surge in claims was not limited to asbestos cases. A 2002 West Virginia Chamber of Commerce study found that litigation activity increased 53.6 percent more rapidly in the state than in the nation during the preceding decade. *See The Perryman Group, The Negative Impact of the Current Civil Justice System on Economic Activity in West Virginia* 3 (2003). A reputation as a pro-plaintiff forum contributed to the attraction of nonresident claims to West Virginia.

In reaction to the influx of claims from across the country, the West Virginia Legislature took the prudent step of

amending the state's venue statute in 2003. It provided that "a nonresident may not bring an action in a court of this state unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state." W. Va. Code § 56-1-1(c). The Respondents are likely to contend that this law indiscriminately denies all nonresidents access to West Virginia courts. To the contrary, it allowed nonresidents to sue if a "substantial part" of the acts or omissions giving rise to the claim occurred in West Virginia or the nonresident could not obtain jurisdiction over the defendant where the claim arose. *See id.*

Although many states have applied similar restrictions on lawsuits brought by out-of-state claimants, either by statute or through judicial application of traditional forum non conveniens principles, the West Virginia Supreme Court of Appeals invalidated the venue law as a violation of the Privileges and Immunities Clause. *See Morris v. Crown Equip. Corp.*, 633 S.E.2d 292 (W. Va. 2006).

The Privilege and Immunities Clause provides that "[t]he citizens of each state shall be entitled to all privileges and immunities of citizens of the several states." U.S. Const. art. IV, § 2. The Clause is intended "to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *Paul v. Virginia*, 8 Wall. (75 U.S.) 168, 180 (1869). It prohibits states from discriminating between its citizens and the citizens of other states with respect to rights and benefits that are considered fundamental aspects of United States citizenship. This prohibition is not absolute and a state may make such distinctions when it has a substantial interest in doing so. *See infra* at Section II.B.

The West Virginia ruling departs from this Court's well-established precedent upholding similar restrictions and ignores the fundamental state interest in distinguishing be-

tween residents and nonresidents to preserve limited judicial resources for local residents and discourage forum shopping.

II. FORUM NON CONVENIENS SHOULD NOT RETURN TO CONSTITUTIONAL QUESTIONABLITY.

A. The Privileges and Immunities Clause Led to Hesitancy in Judicial Application of Forum Non Conveniens in Early Years.

The doctrine of forum non conveniens is said to have developed in early Scottish practice where courts declined to hear cases when justice dictated that the parties avail themselves of other forums. *See* Edward L. Barrett, Jr., *The Doctrine of Forum Non Conveniens*, 35 Cal. L. Rev. 380, 386-87 (1947). The doctrine arrived in the United States as part of the judiciary's inherent powers and was routinely applied. Paxton Blair's seminal 1929 article on the subject notes that the Privileges and Immunities Clause "led to hesitancy on the part of the courts in applying it to appropriate cases" in the nation's early years. Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 Colum. L. Rev. 1, 3 (1929); *see also* Barrett, *supra*, 35 Cal. L. Rev. at 389. This was due in part to Justice Bushrod Washington's famous dictum in *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3230), in which he asserted that the right of access to the courts of a state is one of the privileges protected by the Clause; a statement that was cited with approval in several early cases of this Court. *See* Barrett, *supra*, at 389-90.

B. This Court Eliminated the Confusion and Firmly Established the Doctrine as Constitutionality Permissible.

This Court began to dissipate the confusion when it made clear that states may constitutionally limit the ability of non-

residents to bring actions in state courts in a case arising under FELA. *See Douglas v. New York, N.H. & H. R.R. Co.*, 279 U.S. 377 (1929). In that case, a New York statute provided that a foreign corporation or nonresident could only sue a foreign corporation in New York if the defendant foreign corporation conducted business in New York. *See id.* at 386. A Connecticut resident challenged the law on the basis that it allowed a New York resident to sue a foreign corporation in New York that conducted no business in the state, but did not provide him the same treatment. *See id.* In upholding that law, Justice Holmes, writing for this Court, recognized that "[t]here are manifest reasons for preferring residents in access to often overcrowded Courts, both in convenience and in the fact that broadly speaking it is they who pay for maintaining the Courts concerned." *See id.* at 387. The Court found no constitutional violation because the Privileges and Immunities Clause only prohibited discrimination on the basis of *citizenship*, not *residency*. *Id.*

By 1941, Justice Frankfurter referred to forum non conveniens as a "familiar doctrine" that a jurisdiction may decline to entertain an action "that in justice may be tried elsewhere" and as a firmly imbedded manifestation of a "civilized judicial system." *Baltimore & Ohio R.R.. Co. v. Kepner*, 314 U.S. 44, 55 (1941). In 1947, the Court further closed any outstanding question on the constitutional legitimacy of court action to control filings by nonresident plaintiffs. In *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), a Virginia resident sued a Pennsylvania corporation in a New York federal court for a negligence action arising in Virginia. Justice Jackson, in affirming the dismissal of the action with instructions that it be filed in Virginia, set forth a nonexclusive list of private and public interest factors that a court may consider in deciding whether to dismiss a case under the doctrine. *See id.* at 508-09. Many courts continue to consider these factors today. *See infra* Section IV.

What should have been the final nail in this line of cases was *State of Missouri ex rel. Southern Ry. Co. v. Mayfield*, 340 U.S. 1 (1950). This Court addressed two cases arising under FELA brought in the Circuit Court of the City of St. Louis, Missouri. In both cases, the plaintiffs were not residents of Missouri, the defendant was a foreign corporation, and the accident giving rise to liability occurred outside of Missouri. *See id.* at 2-3. Citing *Douglas*, this Court affirmed that a court may limit lawsuits by nonresidents to overcrowded courts without offending the Privileges and Immunities Clause, so long as it did not distinguish between nonresident citizens and nonresident noncitizens. *See id.* at 3-4.

C. The West Virginia Decision Conflicts with the Rulings of Other Courts.

State and federal court decisions have uniformly found that the Privileges and Immunities Clause does not prevent courts from applying forum non conveniens rules to limit the accessibility of courts to nonresidents. *See, e.g., Rosenthal v. Unarco Indus., Inc.*, 297 S.E.2d 638, 641 (S.C. 1982); *Qualley v. Chrysler Credit Corp.*, 217 N.W.2d 914, 915 (Neb. 1974) (citing *Mayfield*); *Gore v. United States Steel Corp.*, 104 A.2d 670, 675 (N.J. 1954); *Price v. Atchison, T & S.F. Ry. Co.*, 268 P.2d 457 (Cal. 1954). These and many other decisions demonstrate that a state's substantial interest in preserving access to the courts for residents, controlling court dockets, and preserving taxpayer dollars for litigation brought by local litigants or disputes allows it to reasonably restrict access to nonresidents when their cause of action originates outside of the state. *See infra.*

For example, in 1997, the Texas Legislature enacted a law targeted to address an influx of out-of-state asbestos claims that had crowded its courts, much like the West Virginia statute at issue in the case at bar. *See* Tex. Civ. Prac. & Rem. Code § 71.052. The law prohibited the filing of per-

sonal injury and wrongful death claims related to asbestos exposure in state courts when the plaintiff was not a Texas resident at the time the claim arose and the plaintiff's claim arose outside Texas. *See id.* The Texas Supreme Court, relying on *Douglas* and *Mayfield*, found no violation of the Privileges and Immunities Clause because the statute discriminates solely on the basis of residence, not citizenship. *See Owens Corning v. Carter*, 997 S.W.2d 560, 571 (Tex. 1999). The court recognized that modern Privileges and Immunities analysis disfavors distinctions between residents and citizens in most contexts, but found that "we are nonetheless bound to follow *Douglas* because it has never been overruled by the Supreme Court." *Id.*

The West Virginia Supreme Court of Appeals' decision in the case at bar appears to be the first of its kind. It departs from the rulings of this Court permitting distinctions based on residency in matters of judicial administration that have never been repudiated and remain both good law and sound public policy. It is also in stark contrast to the rulings of other courts finding no violation of the Privileges and Immunities Clause in such cases. Although this Court has made clear that "[l]ike many other constitutional provisions, the privileges and immunities clause is not an absolute," *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284 (1985) (quoting *Toomer v. Witsell*, 334 U.S. 385, 396 (1948)), the West Virginia Supreme Court of Appeals neglected to even consider the legislature's "substantial reason" for distinguishing between residents and nonresidents.

D. This Court Should Reaffirm the Constitutionality of Distinctions Based on Residency in Judicial Administration of the Courts.

Privileges and Immunities jurisprudence developed in cases unrelated to forum non conveniens to abandon the distinction between "residents" and "citizens," and courts began

to use the terms interchangeably. *See Piper*, 470 U.S. at 278 n.6; *Austi[illegible]v. New Hampshire*, 420 U.S. 656, 662, n.8 (1975). T[illegible]odern focus of the Privileges and Immunities analysis is whether the state's restriction of nonresident activity is "sufficiently basic to the livelihood of the nation" so as to fall within the Clause, and, if so, whether the state has shown that the restriction is closely related to a substantial interest. *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 64-65 (1988); *Piper*, 470 U.S. at 284.

The West Virginia Supreme Court of Appeals appears to have taken advantage of this Court's change in emphasis from resident v. citizen to a more functional test to completely ignore *Douglas* and *Mayfield,* without so much as a citation to these cases that are so closely on point. It ignored the substantial reason for the difference in treatment between residents and nonresidents; notably the state's objective to protect access to the courts for local residents and to address inappropriate forum shopping. It is important that this Court grant certiorari to reaffirm the continuing viability of distinctions based on residency that limit the burden on state courts, taxpayers, and local litigants, and discourage forum shopping, under modern Privileges and Immunities jurisprudence.

III. NUMEROUS STATE STATUTES AND JUDICIAL APPLICATION OF FORUM NON CONVENIENS COULD BE THROWN INTO QUESTION.

The West Virginia Supreme Court of Appeals decision affects the ability of its state's legislature to allocate limited judicial resources and stem forum shopping. Further, its construction of the U.S. Constitution could have a much broader and detrimental impact; it could throw into question numerous state statutes and judicial application of traditional forum non conveniens principles to disfavor claims filed by nonresidents that have little or no relation to the forum state.

A. State Statutes Explicitly Consider the State of Residence of the Parties.

The West Virginia Supreme Court of Appeals decision, if allowed to stand, will place in doubt the constitutionality of numerous state venue statutes regulating access to the courts on the basis of the residence of the parties. Several states have adopted forum non conveniens statutes that make such distinctions. For example, South Carolina law provides that a nonresident may not file a lawsuit in state court against a foreign corporation unless the cause of action arose within the state. S.C. Code § 15-5-150. Louisiana law applies forum non conveniens principles only when a plaintiff is a nonresident of the state; the statute exempts plaintiffs who are "domiciled in this state." La. Code Civ. Proc. art. 123(B). Virginia law provides that only "a person who is not a resident of the Commonwealth" may request dismissal on the basis that there is a more convenient forum which has jurisdiction over all the parties. Va. Code Ann. § 8.01-265.

Several states have adopted laws specific to asbestos or silica litigation applicable to nonresidents. Florida law provides that "[a] civil action alleging an asbestos or silica claim may be brought in the courts of this state if the plaintiff is domiciled in this state or the exposure to asbestos or silica that is a substantial contributing factor to the physical impairment of the plaintiff on which the claim is based occurred in this state." Fla. Stat. § 774.205(1). Similarly, Georgia law provides that "a civil action alleging an asbestos claim or silica claim may only be brought or maintained in the courts of Georgia if the plaintiff, whether a citizen of Georgia or a citizen of some other state, is a resident of Georgia at the time of filing the action or the exposure to asbestos or silica on which the claim is based occurred in Georgia. . . ."). Ga. Code § 51-14-8. Tennessee law states, "No civil action alleging a silica claim or mixed dust disease

claim may be filed in the courts of Tennessee after the effective date of this part unless the plaintiff was a resident of Tennessee at the time the claim arose or the plaintiff's claim arose in Tennessee." 2006 Tenn. Pub. Acts, ch. 728, § 9(a).

State legislatures, in enacting these laws, relied on well-settled opinions of this Court that distinctions based on residency for the purpose of controlling limited judicial resources are constitutionally permissible. The West Virginia decision threatens to encourage constitutional challenges to these and other state venue laws and may discourage other states from enacting reasonable, necessary, and narrowly tailored laws to address clogging of their courts with nonresident claims that have little or no relation to their state.

B. The State of Residence of the Plaintiff is an Important Factor in Judicial Application of Forum Non Conveniens.

State courts, in exercising their inherent power to dismiss cases for forum non conveniens or in applying state codification of forum non conveniens principles, frequently consider the state of residence of the plaintiff in their analysis.

Often, courts find that while a plaintiff's choice of forum receives substantial deference, little or no deference is extended when a plaintiff is a nonresident. *See, e.g., Coonley & Coonley v. Turck*, 844 P.2d 1177, 1182 (Ariz. Ct. App. 1993); *Kaiser Found. Health Plan of Mid-Atlantic States, Inc. v. Rose*, 583 A.2d 156, 158 (D.C. 1990); *Marchman v. NCNB Texas Nat'l Bank*, 898 P.2d 709, 720 (N.M. 1995).

Other states find that where the plaintiff is a resident of the forum state, "the doctrine of forum non conveniens has only extremely limited application," *Crowson v. Sealaska Corp.*, 705 P.2d 905, 908 (Alaska 1985) (citing *Thomson v. Cont'l Ins. Co.*, 427 P.2d 764, 768 (Cal. 1967)), or applies only in "unusually extreme circumstances." *Telemundo Net-*

work Group, LLC v. Azteca Int'l Corp., No. 3d05-259, 2006 WL 921919 (Fla. Ct. App. Apr. 12, 2006) (quoting *SME Racks, Inc. v. Sistemas Macanicos Para Electronica, S.A.*, 382 F.3d 1097 (11th Cir. 2004); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981)). Some courts find that forum non conveniens does not apply at all in cases involving a resident plaintiff. *See PMI Mortgage Ins. Co. v. Deseret Fed. Sav. & Loan*, 757 P.2d 1156, 1158 (Colo. Ct. App. 1988). These courts generally engage in a forum non conveniens analysis *only when the plaintiff is a nonresident*. Such limitations are "based primarily on the interest of a state in providing a dispute resolution forum for its own residents." *See id.* at 1158.

Finally, many, if not all, state courts explicitly consider plaintiff's state of residence in determining the availability of a more convenient forum. Some courts consider it "an important factor," even if not a controlling one. *See, e.g., Silver v. Great American Ins. Co.*, 278 N.E.2d 619 (N.Y. 1972).

State courts frequently use forum non conveniens to dismiss the cases of nonresidents where the claim did not arise in the state. For example, the Mississippi Supreme Court has repeatedly ordered dismissal of asbestos and pharmaceutical product liability claims brought by nonresidents. *See, e.g., Amchem Prods., Inc. v. Rogers*, 912 So. 2d 853, 858-59 (Miss. 2005); *Illinois Cent. R.R. Co. v. Gregory*, 912 So. 2d 829, 836-37 (Miss. 2005); *Culbert v. Johnson & Johnson and Janssen Pharmaceutica, Inc. v. Jackson*, 883 So. 2d 550, 553 (Miss. 2004). These decisions reflect the same public policy considerations as the West Virginia statute: an attempt to unclog court dockets crammed with nonresident claims at the expense of local citizens. *See Illinois Cent. R.R. Co.*, 912 So. 2d at 836. The constitutionality of such legitimate and rational means to control overburdened court dockets has never before been subject to question, until now.

As these statutes and decisions demonstrate, application

of the Privileges and Immunities Clause to prohibit consideration of a plaintiff's state of residence would have an extraordinarily broad impact across the nation. This Court should grant certiorari to clarify that emphasis on a party's state of residence in when applying forum non conveniens principles is, and remains, constitutionally permissible.

IV. CERTIORARI IS NEEDED TO REAFFIRM LEGITIMATE STATE INTERESTS IN PRESERVING COURT ACCESS AND DISCOURAGING FORUM SHOPPING.

This Court's precedent recognizes that states may constitutionally distinguish between residents and nonresidents with respect to a covered privilege if the restriction is closely related to a substantial interest. *See Friedman*, 487 U.S. at 64-65. This Court should grant certiorari because the West Virginia Supreme Court of Appeals' interpretation of the Privileges and Immunities Clause creates a chilling effect on other states that may wish to enact rational venue laws and apply principles of forum non conveniens. The West Virginia decision trespasses on the important public policy considerations that underlie such legislative and judicial actions.

A. Interests of Local Residents, Judicial Administration, Jurors and Taxpayers are at Stake.

The West Virginia Legislature adopted the statute at issue to control a flood of litigation entering the state by nonresidents whose claims had little or no relation to the state. It did so for precisely the same public interest considerations recognized by this Court in *Gulf Oil Corp. v. Gilbert*:

> Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. . . . There is an appropriateness too, in having the trial . . . in a forum that is at home with the state law that must govern the

> case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

330 U.S. at 508-09. Moreover, such litigation is paid for by taxpayers and heard by jurors who have no interest in foreign claims. In reliance on *Gilbert*, state courts have considered case load congestion in deciding motions for forum non conveniens and dismissing cases brought by out-of-state plaintiffs. *See, e.g., Lesser v. Boughey*, 965 P.2d 802, 806 (Haw. 1998). The Michigan Supreme Court has noted that the public interest favors declining jurisdiction when the case is "imported litigation," particularly in light of already crowded court dockets. *Anderson v. Great Lakes Dredge & Dock Co.*, 309 N.W.2d 539, 543-44 (Mich. 1981). Some state courts have even opted to discontinue action in a pending case after the plaintiff moves out of the state. *See, e.g., Carter v. Netherton*, 302 S.W.2d 382 (Ky. Ct. App. 1957).

B. Haziness in the Constitutionality of Restrictions on Nonresident Access to the Courts Will Have a Chilling Effect on State Efforts to Address Forum Shopping.

States have a substantial interest in regulating access to their courts to discourage and prevent forum shopping for favorable law, procedures, or juries. These motivations led the West Virginia Legislature to enact the law at issue. Unwarranted forum shopping is also a concern in the case at bar, where the plaintiff may seek the benefit of West Virginia's adoption of comparative fault and avoid Virginia's application of contributory negligence. *See infra.*

States have applied the doctrine of forum non conveniens to stem such abuse, and their authority to do so has never been subject to question by the Privileges and Immunities Clause. For example, the Supreme Court of Oklahoma has found that an automobile accident case brought by an Arkan-

sas resident in an Oklahoma court was properly dismissed after the plaintiff candidly stated: "Naturally, plaintiff and her attorneys made this selection because they felt this would be the most advantageous jurisdiction for the presentation of the plaintiff's case." *Pruitt Tool & Supply Co. v. Windham*, 379 P.2d 849, 850 (Okla. 1963). The court found, however, that the potential for a nonresident plaintiff to obtain a higher verdict did not outweigh the burden to the court of hosting the litigation. *See id.* (citing *St. Louis-San Francisco Railway Co. v. Superior Ct.*, 290 l .2d 118 (Okla. 1955)).

District of Columbia courts have also applied forum non conveniens to dismiss the cases of nonresidents who file suit in the District to avoid tort reform laws in their home states. For example, in *Kaiser Found. Health Plan of Mid-Atlantic States, Inc. v. Rose*, the District of Columbia Court of Appeals found that the trial court properly dismissed a Virginia resident's medical malpractice claim in an action that arose in Virginia. *See* 583 A.2d 156 (D.C. 1990). The court found that "one of the purposes of the doctrine of forum non conveniens is to prevent forum-shopping" and that this purpose would be "ill-served" if the plaintiff were permitted to avoid Virginia's limit on noneconomic damages by bringing an action in the District. *Id.* at 160.

More recently, the District of Columbia Court of Appeals found that a case brought by several nonresident psychiatric patients against several corporate entities and doctors was properly dismissed. *See Eric T. v. Nat'l Med. Enter., Inc.*, 700 A.2d 749 (D.C. 1997). The court found that plaintiffs appeared to file their claims in the District to avoid Maryland's tort reform restrictions, including a mandatory arbitration system, and noted that nonresidents were increasingly bringing actions in the District due to the courts' reputation for reducing delays on its civil calendar. *See id.* at 753. The court expressed concern, much like the concerns underlying

the West Virginia law, that the nonresident cases at issue were the tip of the iceberg. Allowing nonresidents to proceed with such complex cases would overwhelm the court's already crowded docket and place a significant burden on local citizens who would need to serve on lengthy trials to decide such cases. *See id.* at 757.

Here, the plaintiff likely chose to file in West Virginia rather than Virginia, where the plaintiff lives and the accident occurred, to benefit from its law. While West Virginia has adopted a system of comparative fault, *see Bradley v. Appalachian Power Co.*, 256 S.E.2d 879, 885 (W. Va. 1979), Virginia continues to apply contributory negligence as a complete bar to recovery, *see Litchford v. Hancock*, 352 S.E.2d 335, 337 (Va. 1987). While choice of law principles would ordinarily mandate that West Virginia apply Virginia law to avoid such forum shopping, the West Virginia Supreme Court of Appeals has held that it will not apply the contributory negligence rules of other states as a matter of public policy. *See Mills v. Quality Supplier Trucking, Inc.*, 510 S.E.2d 280, 282-83 (W. Va. 1998). If West Virginia courts are not permitted to dismiss the claims of nonresidents whose claims do not arise in West Virginia, its courts will see more claims from both its neighbors, Maryland and Virginia, which apply contributory negligence. *See Franklin v. Morrison*, 711 A.2d 177 (Md. 1998). Thus, the floodgate restraining nonresident asbestos claims is likely to burst.

CONCLUSION

For the foregoing reasons, *amici curiae* the American Tort Reform Association, the Chamber of Commerce of the United States of America, the NFIB Legal Foundation, and the West Virginia Chamber of Commerce respectfully request that this Court grant the Petition for a Writ of Certiorari in this action.

Respectfully submitted,

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APPENDIX

APPENDIX A

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed *amicus curiae* briefs in cases before federal and state courts that have addressed important liability issues.

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation representing a membership of more than three million businesses and organizations of every size. U.S. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world. A central function of the U.S. Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the U.S. Chamber has filed amicus curiae briefs in numerous cases involving issues of vital concern to the nation's business community.

The NFIB Legal Foundation, a 501(c)(3), tax-exempt public-interest law firm established to be the voice for small business in the nation's courts and the legal resource for small business, is the legal arm of the National Federation of Independent Business ("NFIB"), the nation's leading small-business advocacy association, with offices in Washington, D.C. and all fifty state capitals. Founded in 1943 as a non-profit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. To fulfill this role as the voice for small business, the NFIB Legal Foundation frequently files

amicus briefs in the courts that inform courts how the decision they make in a given case will impact small businesses nationwide. NFIB's members own and operate many of America's independent businesses, which create two-thirds of the new jobs in the United States.

The West Virginia Chamber of Commerce ("West Virginia Chamber") is the recognized "voice of business" in West Virginia as an advocate in the judicial, legislative and executive branches for its 1,800 members. In that role, it strives to encourage public policies that foster relocation of new business to and the expansion of existing businesses within the state, so that all West Virginians can enjoy the benefits of a robust economy. The Chamber has been a consistent advocate for a legal system that is predictable in its outcomes and functions within the mainstream of established jurisprudence to ensure that businesses in West Virginia can and do operate under the same general ground rules as their competitors elsewhere in this country. Preserving a fair judicial system not only benefits businesses involved in commerce, but the West Virginians who have claims to be heard efficiently in the courts.